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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 71-164

VIRGINIA STAGE LINES, INC., *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Virginia Stage Lines, Inc., prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A to this petition, *infra,* pp. 1-10) is reported at 441 F.2d 499. The decision and order of the National Labor Relations Board (App. C, *infra,* pp. 13-28) are reported at 182 N.L.R.B. 107.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 11) was entered on May 10, 1971. Petitioner's timely petition for rehearing *en banc* was denied on May 5, 1971 (App. B, *infra,* p. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board has exceeded its powers and intruded into an area of regulation barred by statute in treating as "concerted" activity meriting statutory protection, the separately delivered ultimatums of two non-union employees whose objections were not to crossing the picket lines established at their employer's premises by union employees based elsewhere, but only to the particular assignment they were requested to perform.

More specifically, whether the Board may accord statutory protection to these and all other employees who adopt this posture, and concomitantly, order an employer not to discriminate against such employees during the course of strike if they refuse to perform work which the strikers—of the same or any other employer—"contend would normally be performed by them".

2. Whether the holding of the court below with respect to the issue it framed for decision, conflicts with those of other circuit courts of appeals.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

* * * * * * *

Section 1(b) "It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, . . ."

* * * * * * *

Section 7. "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

* * * * * * *

Section 8(a) "It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

STATEMENT

1. This case is an exceptional one in the annals of the National Labor Relations Board (the Board) in that it is the vehicle for introducing a novel doctrine in the regulation of industrial labor relations together with

a newly devised remedy for its implementation and enforcement. Both facets are glossed over, in the first instance, by the Trial Examiner in his decision and, more importantly, left without the benefit of explication by the Board itself. As if this were a run-of-the-mill case with no unconventional features, the Board, by a three member panel, adopted the Trial Examiner's decision *in toto,* through the so-called short form—or "rubber stamp"—technique of affirmance (App. C, pp. 26-27).[1]

Compounding this initial lapse in the discharge of adjudicatory responsibility, the opinion of the reviewing court below—even as the Board's presentation in that forum—fails to examine and come to grips with the innovations that distinguish the Board's decision and order, which were nevertheless enforced in full.

2. Petitioner, an interstate bus line, operates in part out of a terminal in Washington, D. C. While petitioner's regular service is channelled primarily to destinations south and west in Virginia and West Virginia, it is authorized to operate charter trips to the north and, indeed, from its route to any point in the country (J.A. 89).[2] The charge in the case at bar was filed on behalf of two (out of a total of 175) unorganized drivers in petitioner's Eastern division covering Washington, D. C., who on different occasions re-

[1] The Board made an insignificant modification of no relevance here, in the phraseology of that part of the Order requiring the petitioner to offer the two employees involved, substantially equivalent employment in the event their former jobs "no longer exist" (App. C, p. 27).

[2] "J.A." refers to the Joint Appendix filed with the court below, containing those portions of the record necessary for judicial review.

fused to operate a northbound charter run in the factual context detailed below. The resulting question was whether they had thereby engaged in 'concerted activities'' within the meaning of Sections 7 and 8(a)(1) of the National Labor Relations Act (the Act) and thus acquired special statutory rights immunizing them from discharge.

With respect to petitioner's labor relations approach, it had never been charged with any unfair labor practice in some three decades of operation (J.A. 61). While, over the years, various unions failed to win in a number of Board supervised elections in petitioner's Eastern division, employees in its Western division—not involved here—have long been represented by a labor organization in their dealings with petitioner (J.A. 60-62, 121-127). The Board's decision in this case specifically absolves petitioner of any anti-union animus or discriminatory activity of the kind broadly proscribed by the Act (App. C, pp. 19-20); instead, its findings of unfair labor practices rest on narrow and highly technical grounds.

Petitioner and a second bus line, Safeway Trails, Inc. (Safeway), both subsidiaries of Continental Trailways, Inc., operate regularly scheduled runs from the same terminal in Washington, D. C., the facilities of which are also shared by other bus lines (J.A. 106). Still a third company, Trailways Terminal of Washington, D. C., operates the terminal and, acting through its Tour Office, serves as promotional as well as booking agency or clearing house for charter trips developed in the Washington zone (J.A. 106). Apportionment of the charter business as between the two bus lines is made on the basis of a quota preestablished by their general managers on the basis of personnel

and equipment available for the peak tour season (J.A. 104-105). The practice was to assign the northern charter runs largely to Safeway, since its regularly scheduled service was primarily to the north and east of Washington, and the southern charter runs to petitioner. However, if either company's quota were exhausted or its equipment or manpower unavailable when needed, the Trailways Terminal would assign a northern run to petitioner or, conversely, a southern run to Safeway (J.A. 105-106). If neither could handle the particular charter trip, other available Trailways carriers or non-affiliated companies would be sought (J.A. 106).[3]

As separately managed entities, petitioner and Safeway each has its own distinctive labor relations policy. In a dispute over contract terms, the unionized drivers of Safeway, in April 1969, launched a strike which continued for some five months, in the course of which they established picket lines around the Washington terminal and the related garage, located some miles away (J.A. 9-10, 132). Petitioner maintained normal operations, despite the picketing of these facilities; its drivers, as well as those of other carriers, consistently—and without complaint—crossed the picket lines in the pursuit of their daily work routine (J.A. 9-10).

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[3] Both petitioner and Safeway are members of the National Trailways Bus Association, a trade association, which was established in 1935 by various companies independent of Greyhound Lines, Inc. in order to provide effective competition to Greyhound. They often share terminal space and maintain integrated schedules (J.A. 10-11; footnote 2, *Transcontinental Bus System, Inc.*, 178 NLRB No. 110 (1969)). Capitol Buslines, for example, which operates out of the Washington terminal, is an independent carrier having no connection with either Safeway or petitioner, except that it also belongs to the National Trailways Bus Association (J.A. 106).

As a result of the economic strike, Safeway discontinued its regular runs but continued to operate charter trips, in the same manner as before although on a necessarily curtailed basis, with resort to a reduced force composed of non-striking personnel (J.A. 96, 106-108). Petitioner's charter operations expanded during the strike with an appreciable increase in its daily trip quota; the remaining overflow of charters, many of which had been booked long before the strike, was absorbed by other carriers operating out of the Washington area (J.A. 106-108, 114).

Against this background, the developments ensued culminating in the discharge by petitioner of the two driver-employees in question. Both Charles Tallent and Richard Loughhead were drivers on a so-called "extra board" status—that is, because of comparatively low company seniority, they were assigned in rotation with the others in this classification to charter trips and as substitutes on regularly scheduled runs or to operate special sections (J.A. 19, 26, 66, 85). On several occasions, before and after the onset of the Safeway strike, both drivers had taken charter assignments to destinations north of Washington (J.A. 20-21, 23, 35-56); the separate episodes resulting in their discharge, arose two months or more after the strike began; and at no time did either exhibit any qualms about crossing the picket lines.

Loughhead, on Sunday morning, June 1, refused to take a charter assignment requiring a round trip to New York, because, as he advised the dispatcher—and subsequently petitioner's supervisory staff—he had been threatened by a group of pickets with harm to his vehicle and person (J.A. 23-24, 133). Petitioner's General Manager and senior operating official, Carl

Harmon, on being summoned from his home, sought to assuage Loughhead and offered assistance with respect to the threats, giving him until midnight as a "fair . . . and reasonable" period to decide and communicate his willingness to accept the assignment, since petitioner could not tolerate a driver seeking to "pick and choose", under its system of rotating assignments (J.A. 63, 64-65). Notwithstanding Harmon's admonition that he would otherwise be "voluntarily terminating his employment", Loughhead permitted the time to expire without agreeing to return to work (J.A. 24, 28, 63).

However, several days later, Loughhead notified his Divisional Supervisor that if the "rest of the drivers" continued to accept northbound charters, he would do likewise (J.A. 29, 98). Loughhead was subsequently advised by General Manager Harmon, to whom he had been referred, that petitioner could not return him to the extra board because of his failure to signify an intention, prior to the expiration of the Sunday midnight deadline, to take his proper turns there (J.A. 29, 64-65).

In this same period, on June 8, two other drivers balked at taking northbound charters (J.A. 77). On being informed by a company official that they would be permanently removed from the extra board if they persisted, the pair agreed to accept any and all assignments in their turn, and there was no further incident (J.A. 78-80).

Finally, with respect to Tallent, on Sunday, June 10, he declined to take a northbound charter trip on the ground that he had been threatened by the pickets and that he regarded the trip as "Safeway work" (J.A.

43, 93). Sustained efforts by petitioner's assistant general manager to dissuade him, including an offer of protection with respect to the threats, were unavailing (J.A. 81, 82). Tallent was reminded that he had been excused two months earlier from taking a New York charter run because of a plea of illness (J.A. 66) but that if, under the present circumstances, he refused his regular turn on the extra board, this would be tantamount to "resigning" (J.A. 42, 135). Tallent thereupon considered himself "fired" and made no subsequent overtures toward reinstatement (J.A. 42).[4]

As an aftermath, the requests for a transfer to Richmond, Virginia of two Washington extra board drivers were cancelled after Loughhead and Tallent were terminated because of the need for experienced extra board men in Washington (J.A. 93-94).

The Board Rests Upon Its Trial Examiner's Decision

3. The Board, having adopted the Trial Examiner's decision and recommendations without evaluation or comment, ratified his theory of the case (App. C, p. 26).

The decision at this level dismissed allegations that Loughhead and Tallent were discriminated against because of union activities (or that petitioner interrogated any employees concerning their union activity), with the finding that petitioner was not shown to be aware of any organizational activity or that its approach to these two drivers "was harsher than to other drivers who originally refused to take charter trips

[4] As a consequence, the charter trip was cancelled and petitioner was required to refund the initial trip deposit (J.A. 86). In the earlier instance of Loughhead's refusal of his assignment, petitioner was required to hire a bus and driver in New York to return the passengers to their destination (J.A. 76).

north" (App. C, pp. 19-20). However, the Board held that the men were discharged in violation of Section 8 (a) (1) of the Act, for engaging in statutorily protected concerted activity in the interests of a labor organization, on the ground that they "were making common cause with the Safeway strikers" by refusing to drive northbound charters and were thus assisting the striking union (App. C, p. 20).

The full weight of the decision rests upon the premise that the "Board has repeatedly held that employees who respect a picket line of striking employees are thereby engaging in protected concerted activity" and that the "*action of the employees in this case in refusing to drive northbound charters was equivalent to their respecting the picket lines and hence enjoyed statutory protection*" (App. C, p. 21). (Italics supplied.)

Further equating this case with those in which there was simply a refusal to cross a picket line, the Board held that the mantle of protection for such concerted activity extends "*a fortiori*" to the two employees here involved, since their employer is a "sister corporation of the struck company" and the work refused "in all probability normally would have been performed by the struck company" (App. C, p. 21). In this connection, the Board singles out the dissenting opinion in a leading case decided by the United States Court of Appeals for the Eighth Circuit, *N.L.R.B.* v. *Everist, Inc.*, 334 F.2d 312 (1964), as correctly stating the law (App. C, p. 21).

Applying its now familiar maxim, in the line of cases on which it relies, the Board held that while petitioner was "of course, free to replace . . . or indeed to discharge" the two drivers if that were "reasonably nec-

essary", its action was in "reprisal" for their concerted activity and not in order "to carry on its business," since they had not been permanently replaced (App. C, p. 21).

In addition to ordering reinstatement of the two drivers with back pay, the Board—in a sharp departure from the well-nigh standard order which has characterized the class of cases it cites [5]—requires petitioner to refrain from discrimination against "any employee" who "has assisted a labor organization *by refusing during the course of a strike to perform work which the strikers contend would normally have been performed by them*" (App. C, p. 23). (Italics supplied.) In the same vein, petitioner is directed to post a notice to its employees that it will not discharge or otherwise discriminate against any of them *"for refusing during the course of a lawful strike, to perform work which the strikers contend would normally be performed by them"* (App. C, p. 25). (Italics supplied.)

The Court of Appeals Decision

4. The Board's order was enforced by a divided court of appeals (Judges Butzner and Craven, Judge Bryan dissenting). Reverting to its earlier decision in *NLRB* v. *Union Carbide Corporation*, 440 F.2d 54 (C.A. 4,

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[5] *"Lenkurt Electric Co., Inc.*, 177 NLRB No. 87, and the cases there collected. . . ; *Smith Transit, Inc.*, 176 NLRB No. 141, and the cases there discussed . . . ; *Nuodex Division of Tenneco Chemicals, Inc.*, 176 NLRB No. 79, and the cases there cited . . . ." (App. C., p. 21).

Typically the employer in these cases is ordered to cease and desist from "discharging or refusing to reinstate any employee because he has assisted a lobor organization *by refusing to cross a lawful picket line at his place of work."* (Italics supplied.) *Lenkurt Electric Co., Inc.*, 177 NLRB No. 87.

1971), the court believed that this case presented the question whether the Act protected an employee "*who refused as a matter of principle to cross a picket line maintained by fellow employees at his employer's place of business*" regardless of whether the striking union was his bargaining representative (App. A, p. 5). (Italics supplied.) Answering in the affirmative, the court announced its agreement with the Fifth Circuit that such an employee "has in effect plighted his troth with the strikers . . . and thus become a striker himself" (App. A, p. 5). It equated this case with the decisions of the Fifth and Sixth Circuits to this effect.[6]

At the same time, the court below recognized that "the rule against partial strikes is unquestioned" and declared it was not holding that employees "could engage in a slowdown, or in any way decline to perform all their assigned work and yet remain on the job entitled to their pay" (App. A, p. 7). However, the court was of the view that this principle was not applicable in the circumstances here (App. A, p. 7), fn. 5).

The dissenting opinion below is based on the proposition that the dischargees were simply actuated by fear of personal harm in their refusal to perform their jobs, thus disqualifying them from having made "common cause" with the strikers, such as to merit protection under Section 7 of the Act. This principle, the dissenting judge emphasized was enunciated in *NLRB* v. *Union Carbide Corporation, supra,* which, he stated, the majority "now completely repudiates" (App. A, pp. 9-10).

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[6] Citing: "NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1301 (5th Cir. 1970); accord, NLRB v. Difco Laboratories, Inc., 427 F.2d 170 (6th Cir. 1970); contra, NLRB v. Illinois Bell Telephone, 189 F. 2d 124 (7th Cir.), *cert. denied,* 342 U.S. 885 (1951)." (App. A, p. 5).

REASONS FOR GRANTING THE WRIT

1. The holding of the court of appeals, endorsing the exercise by the Board of statutory powers it does not possess, is inconsonant with the Congressional grant of regulatory authority in the Act. If the judgment below is permitted to stand, the breech invites widening by other such unwarranted incursions, and will promote disruption of labor-management equilibrium in industry, contrary to the legislative goal expressed in Section 1(b) of the Act.

The factual simplicity of this case renders all the more inexplicable the camouflage that has somehow obscured the underlying issues, which escaped the attention of the court below. The undisputed record shows two employees who—along with their fellow drivers numbering almost two hundred—never once objected to crossing the picket lines, but after having done so for weeks on end, sought to dictate the nature of the work they were willing to perform; i.e., they would accept trip assignments to one geographical area but not another. These employment conditions were viewed by the Board as constituting conduct "equivalent to their respecting the picket line" and, on this basis, deserving of "statutory protection".

In seeking to follow the Board's reasoning on this score, logic soon gives way to an absurd riddle: When is *crossing* a picket line, as here, "equivalent" to *not crossing* (or "respecting") a picket line? The answer to this exercise in fantasy apparently is—whenever the Board would have it so.

In reality, the Board's semantics, if judicially approved, would equip this regulatory agency with a veritable magic formula for opening, at will, any door to the innermost managerial recesses of the business or

industrial complex, a result never contemplated by the framers of the Act. Indeed, the Board offers a new concept in industrial relations—that of a portable picket line which can be moved, figuratively speaking, from outside the plant or establishment to confront a general manager at his very office door, or otherwise set down inside the gates to surround any segment of operations which employees may wish to isolate. In short, the justification which the Board advances—when stripped, as it must be, of support from the unrelated cases on which the Board relies, dealing as they do with a recognizable refusal to cross a tangible picket line (*supra,* p. 11 fn. 5)—breaks down into a contradiction in terms, without support in reason or authority.

Of even more serious concern to us—and, we think, potentially to countless employers across the land who assiduously seek to comply with the Act, in spirit and letter—are the far reaching and harmful implications of the remedy which the Board, without explanation, has synthesized to deal with what, even in its own terms, was a technical violation. We urge that, if for no other reason, full dress review is warranted with a view to the Court's striking down the order in question, if our position on the merits is sound. Compare: *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385, in which this Court declared judicial enforcement of an order is unwarranted "if the Board has patently traveled outside the orbit of its authority so that, there is, legally speaking, no order to enforce" (327 U.S. at 388-389; cf., *Communications Workers* v. *National Labor Relations Board,* 362 U.S. 479.

The fatal flaw of the order we seek to challenge here, as in the court below, is that it does violence to the

accepted principle that that Board has no jurisdiction to police the employer's internal prerogatives. *American Shipbuilding Company* v. *National Labor Relations Board,* 380 U.S. 300, 318 (1965) (concurring opinion of Mr. Justice White); *Fibreboard Paper Products* v. *National Labor Relations Board,* 379 U.S. 203, 217 (1964) (concurring opinion of Mr. Justice Stewart). Compare also: *National Labor Relations Board* v. *Insurance Agents International Union, AFL-CIO,* 361 U.S. 477, in which the Court blocked the Board from "movement into a new area of regulation which Congress had not committed to it" vis à vis the latitude reserved to unions in the collective bargaining process (361 U.S. at 499).

The vulnerability of the order, an issue on which the opinion below is completely silent, may be seen at a glance. Petitioner though found free of anti-union bias is, for the indefinite future, made an open and defenseless target for the consequences of strikes emanating from any quarter, including not only those conducted by the employees of another friendly company, but those of a rival concern, as well.

The Board requires petitioner to notify its entire work force that for the duration of such a "lawful" strike, "any employee", acting singly or in concert, is given license to refuse "to perform work" assignments of the particular kind or category that the strikers *contend* would *normally* be performed by them (*supra,* p. 11). Thus one or more petitioner's employees—on the basis of the mere claims of strikers, made while zealously pressing the cause of their union located elsewhere—have free rein to play havoc with the everyday conduct of an enterprise, in whatever critical department, by refusing to perform a specific part of their regular duties. The refusal, so legitimatized by the Board, need only be premised on what the

strikers "contend" at any given time would "normally" be theirs to do, in order to qualify for special protection under the Act. Conspicuously absent, it may be seen, is any suggestion by the Board of criteria or standards for ascertaining whether the "claim" of the strikers, on which so much hinges, is meritorious or preposterous. The disastrous consequences that could thereby overtake a sophisticated transportation system like the one here involved, whose service is integrated with other nearby lines separately operated (regardless of whether they be considered separate or common employers), are easily envisaged.

The treatment accorded this case by the Board, from the content of the Trial Examiner's initial decision to the litigation posture assumed by the Board before the court of appeals, illuminates the substantiality of the question urged for review. The Board did not see fit to disturb the Trial Examiner's decision, notwithstanding that the document offered no discussion or exposition of his newly-minted remedy or the implementing cease and desist order, as we have noted. As for precedent to buttress the unfair labor practice findings, the Trial Examiner adverted to a series of Board cases, a common element of which was the traditional refusal to cross the traditional picket line, visible to the naked eye. Invariably, the Board's remedy in those cases consisted of a standard cease and desist order barring discrimination against an employee assisting a labor organization by "refusing to cross a lawful picket line at his place of work" (*supra,* p. 11, fn. 5), an order vastly different from the one evolved here.

Apparently taking the cue from this curious reliance, the Board's brief in the court below, in the same mistaken vein, is replete with references to an imaginary refusal to cross a picket line, as the touchstone for its

argument and authorities.[7] Lost sight of entirely was the fragile thread in the Trial Examiner and Board's decision that the employees conduct was "equivalent" only to "their respecting the picket lines" (*supra*, p. 10).

While within the legitimate bounds of advocacy, this misleading approach serves only to hopelessly confuse the issue, since the Board seeks, in support, to invoke a wholly inapposite line of reasoning and cases. Proceeding from the incorrect premise that the activity here in question is statutorily protected, the Board, in substance asserted below, as the Solicitor General did recently on its behalf in this Court, that in such cases—

> "[W]hat is required is the balancing of two opposing rights, and it is only when the employer's business need to replace the employees is such as clearly to outweigh the employees' right to engage in protected activity that an invasion of the statutory right is justified."[8]

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[7] So mesmerized did counsel become by their own repetition—the twenty-three page brief is studded with some eighteen such references—that their summation rested upon the fanciful "refusals" of the two employees here involved "to cross a Safeway . . . picket line" as the Board's reason for concluding they had engaged in "protected activity within the meaning of Section 7 of the Act." Brief for the Board, filed with the court below, p. 23.

[8] Citing *Overnite Transportation Company*, 154 NLRB 1271, 1274 (the hub of the Board's argument on this score) and further citing: *Redwing Carriers, Inc.*, 137 NLRB 1545, 1547, enforced *sub nom. Teamsters Local 79 v. National Labor Relations Board*, 325 F.2d 1011 (C.A. D.C.), *certiorari denied*, 377 U.S. 905; and *Overnite Transportation Company*, 154 NLRB 1271, 1274, enforced *sub nom. Truck Drivers and Helpers Local No. 728* v. *National Labor Relations Board*, 364 F.2d 682 (C.A. D.C.). *Alamo Express, Inc., and Alamo Cartage Company* v. *National Labor Relations Board* (No. 896, petition for certiorari, October Term 1970), Brief for the National Labor Relations Board In Opposition, pp. 5-6.

There can be no quarrel with this long settled principle or with the Board's role as its arbiter (*National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 236); as we have suggested, however, it simply has no applicability to the case at bar. In the event the Board again takes the same tack in response to the instant petition, we submit that such a response is wide of the mark.

Similarly, while we think the court of appeals erred in overruling petitioner's contention that it is a separate and not a common employer insofar as Safeway is concerned (notwithstanding that the Board did not so hold), our plea here does not rise or fall with the resolution of that or related factors. In this regard, it is unnecessary to burden the Court with a consideration of the socalled "stranger" picket line at a plant and the relationship between a struck employer and a socalled "neutral" employer, for example, because again our position places no reliance on these concepts or the cases in which they figure.[9] Suffice it to say that the Board's decision contains no finding or hint, nor could it have, that the assignments to which the employees objected was "struck work".[10]

The vice of the decision below is that while condemning partial work stoppages out-of-hand, an aspect touched upon by this Court in *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345

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[9] E.g.: *Redwing Carriers, Inc.*, 137 N.L.R.B. 1545 (1962), *enf'd sub nom. Teamsters Local 79* v. *N.L.R.B.*, 325 F.2d 1011 (C.A. D.C. 1963), *cert. den.* 377 U.S. 905.

[10] The decision characterizes petitioner as a "sister corporation of the struck company" and the assignments refused as "work which in all probability normally would have been performed by the struck company" (J.A. 138). Cf., *Truck Drivers Local 433, Teamsters* v. *National Lobar Relations Board*, 334 F.2d 539 (C.A. D.C. 1964).

U.S. 71 (1953), the majority equated the instant case quite literally with a decision of the court of appeals for the Fifth Circuit, as well as an earlier one of its own, "where employees who refused to cross the picket line were accorded § 7 protection" (App. A, p. 6).[11] This was the patently erroneous basis on which the court of appeals proceeded to enforce, without comment, the Board's far flung cease and desist order as well as the requirement for reinstatement of the employees as "economic strikers" who had not, in the Board's view, been replaced.

Finally, we believe that this is a classic case where, as this Court has stated, "the Board's resolution of the issues have amounted not to a resolution of interests which the Act had left to it for case-by-case adjudication, but to movement into a new area of regulations which Congress had not committed to it." *National Labor Relations Board* v. *Insurance Agents International, supra,* 361 U.S. at 499. The recognized expertise of the Board to which the courts defer (*Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488), is now born of more than thirty five years of experience. If the Board wishes to expand its regulatory frontiers by altering a fundamental concept in its specialized field, it should be required minimally to articulate as well as explain and defend the transition; this has not yet been done. "Where", as this Court has said, "Congress has in the statute given the Board a question to answer, the courts will give respect to that answer; but they must be sure the question has been asked". *National Labor Relations Board* v. *Insurance Agents International, supra,*

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[11] *National Labor Relations Board* v. *Union Carbide, supra; National Labor Relations Board* v. *Southern Greyhound Lines,* 426 F.2d 1299 (C.A. 5, 1970).

361 U.S. at 499. We submit that, in the far reaching circumstances presented here, the question has indeed not been asked by the Act's framers and that the corrective functions of this Court should therefore be brought to bear.

2. The majority decision below, in the terms in which the issues were framed for decision, is admittedly in conflict with *National Labor Relations Board* v. *Illinois Bell Telephone,* 189 F. 2d 124 (C.A. 7), *cert. den.,* 342 U.S. 885 (1951), and is in further conflict with *National Labor Relations Board* v. *L. G. Everist, Inc.,* 334 F. 2d 312 (C.A. 8, 1964), wherein the court of appeals held that the discharge of employees for refusing to cross the picket line at the premises of another employer, in the absence of anti-union animus, was proper and that the company was not required to reinstate them following the strike, even though they had not been permanently replaced.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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